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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 362

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR THE THIRD COMPENSATION DISTRICT, PETITIONER

v.

WARNER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 6–12) is reported in 45 F. Supp. 835. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 14–18) is reported in 137 F. (2d) 57.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 17, 1943 (R. 18). The peti-

tion for certiorari was filed September 17, 1943, and was granted November 8, 1943 (R. 20). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the finding of the Deputy Commissioner, that a bargeman is not "a master or member of a crew" within the exclusionary provision of Section 3 (a) (1) of the Longshoremen's and Harbor Workers' Compensation Act, is conclusive if reasonably inferable from undisputed basic facts.

STATUTE INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424 (33 U. S. C., sec. 901, *et seq.*), are set forth in the Appendix, *infra*, pp. 36–37.

STATEMENT

The facts in the instant case are undisputed and are as follows:

Rusin was employed by the respondent as a bargeman. As such, his duties consisted of the general care of the barge or lighter to which he was at any time assigned, including making lines fast and unfast at docks, and tightening or slackening them as necessary (R. 7). By means of a hand-operated capstan he occasionally assisted

in shifting the barge which had no motive power of its own but was towed from place to place (R. 7). For that purpose he lived aboard the barge (R. 8), which was documented as a vessel of the United States (see R. 15); he ate and slept in quarters there provided for his use, and he supplied his own food (R. 8). The barge never went to sea (R. 8), its operation being confined to waters within a radius of thirty miles of Philadelphia, including rivers and tributaries within the states of Pennsylvania, New Jersey, and Delaware (R. 8). Its trips were not more than sixty miles in length and sometimes took fifteen days between loading and discharging, but the barge was under way only a small fraction of the time (R. 8). As bargeman, Rusin was usually subject to orders of respondent's marine superintendent (R. 4), but when in tow he was subject to the control of the tugboat captain (R. 8). He could not set his own course or control or change it at any time (R. 8). He was "unarticled" (R. 8) and had no experience as a seaman other that that obtained as a bargeman (R. 9). He was paid a flat monthly salary for his service as bargeman, and when he worked on any other boat he received additional compensation at an hourly rate (R. 8). His employment was subject to the contract between the Harbor Boatmen's Union and the Warner Company, which provided, *inter alia* (R. 8):

> Section 6: All Bargemen assigned to specific barges in active operation shall be paid a monthly salary of $80.00 and shall be provided with quarters. This compensation is for all work performed by Bargemen in the operation of his own vessel.
>
> Section 7: The rates as provided herein are based upon all services and time required to safeguard and operate the barge fleet, including necessary pumping, watching, or other emergency duties on Sundays and holidays.

Rusin was injured when the capstan bar, which he was using to shift the barge at a pier, pulled out and struck him upon the chest and caused him to fall (R. 7). At the time, he was the sole person aboard or employed upon the barge (R. 7). He thereafter filed a claim for compensation with the Deputy Commissioner.

On the basis of the foregoing facts, the Deputy Commissioner found that Rusin was not a "master or member of a crew," but a harbor worker, entitled to the benefits of the Longshoremen's and Harbor Workers' Act, and granted him a compensation award. (See R. 6.)[1]

Thereafter pursuant to Section 21 (b) of the Longshoremen's and Harbor Workers' Act (33 U. S. C. 921 (b)), respondent filed suit in the

[1] The material portions of the findings of the Deputy Commissioner which appear in their entirety at pp. 32–33 of the typewritten transcript of the record on file with the Clerk of this Court are set forth on p. 7 of the printed record.

district court to set aside the compensation award (R. 7). The district court affirmed the findings of the Deputy Commissioner, and dismissed the complaint (R. 12).[2]

On appeal, the court below reversed the decree of the district court (R. 18), and found Rusin to be a seaman excluded from the benefits of the Act (R. 17).

SPECIFICATION OF ERRORS

The court below erred:

1. In failing to hold that the finding of the Deputy Commissioner that Rusin was not "a member of a crew," but a harbor worker entitled to the benefits of the Act, was conclusive, since it was a reasonable inference from the basic facts.

2. In undertaking to determine, independently of the Deputy Commissioner's ultimate finding, whether Rusin was a harbor worker covered by the Act or "a member of a crew" excluded from the benefits of the Act.

3. In holding, despite the finding of the Deputy Commissioner to the contrary, that Rusin was in fact "a member of a crew" and therefore excluded from the benefits of the Act.

4. In reversing the judgment of the District Court.

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[2] At the hearing before the district court, additional evidence was introduced by consent of the parties. The district court, although it amplified upon the findings of the Deputy Commissioner, in the end accepted these findings *in toto* (R. 8).

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SUMMARY OF ARGUMENT

I. The determination by the Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act that an employee is not a member of a crew is a conclusion or inference entitled to finality if supported by the evidence and reasonably inferable therefrom (*South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251). The principle of finality of administrative determinations involving conclusions as to the coverage and application of the statute has been applied by this Court not only to determinations under the Longshoremen's Act, but also to similar determinations by regulatory agencies as to status under other statutes. The test is uniformly whether the determination has warrant in the record and a reasonable basis in law. (*Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 146). Denial of finality to such determinations under the Longshoremen's Act would defeat the recognized Congressional purpose of providing a prompt and inexpensive method for the disposal of compensation claims. Certainly the questions presented are peculiarly suited to the examination and determination of the administrative agency especially assigned to that task. The possibility of inconsistent conclusions by courts in cases involving similar facts arising under the Jones Act or general admiralty law does not warrant the denial of finality, and the resulting interference with the orderly administration of the

Act. The existence of a "twilight zone" in which alternate remedies may be available is not objectionable where the attempt to establish certainty would place injured employees under the burden of correctly deciding in advance a controversial legal question. (Cf. *Davis* v. *Department of Labor*, 317 U. S. 249, 254.)

II. The Deputy Commissioner's conclusion that Rusin was a harbor worker and not a member of a crew is reasonably inferable from the basic undisputed facts. His navigational duties were incidental to his other duties, which were primarily those of a caretaker or watchman—classes of maritime workers clearly included under the Longshoremen's Act. There was thus plainly a rational basis for the Commissioner's conclusion.

III. The Commissioner's determination was likewise reasonable in light of applicable rules of law. If the conclusion that an employee is not a member of a crew is one of law, the court below nevertheless erred in setting aside the Deputy Commissioner's conclusion since it is clearly proper under the legislative history of the Act and the decisions thereunder. The exclusion from coverage of members of a crew resulted from opposition by the Seamen's Union to a prior provision including virtually all maritime workers. This Court in the *South Chicago* case recognized the Congressional intention to leave entitled to compensation "all those various sorts of longshoremen and harbor workers who were perform-

ing labor on a vessel and to whom state compensation statutes were inapplicable" (309 U. S. at 257), and cited with approval lower court decisions interpreting the exception as covering only seafaring men subject to the perils of the sea. Rusin plainly does not fit within this group, but belongs to a class of employees whose economic and social characteristics differ markedly from those of seamen.

ARGUMENT

The Longshoremen's and Harbor Workers' Compensation Act provides, in Section 3 entitled "Coverage," that compensation for disability or death resulting from an injury upon navigable waters of the United States shall be payable (except in certain circumstances) to employees, but that "no compensation shall be payable in respect of the disability or death of (1) a master or member of a crew of any vessel." (See Appendix, p. 36.)

The Deputy Commissioner found that Rusin's duties consisted of the general care of the barge or lighter to which he was at any time assigned, and that except for making lines fast and unfast at the dock and tightening or slackening them as necessary, he had no other duty in connection with the operation of the vessel. Accordingly, he held that Rusin was not "a master or member of a crew" but was a harbor worker entitled to compensation. The district court affirmed *in toto*

the findings and conclusion of the Deputy Commissioner, somewhat amplifying those findings. The court below accepted as binding the basic findings of fact of the Deputy Commissioner, on the authority of *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, but refused to be bound by his conclusion based on these findings because, according to the court, a Commissioner's conclusion that an employee is or is not "a master or member of a crew" is "necessarily an ultimate conclusion to be derived from the application of the statute to the basic findings of fact," and therefore "is not binding upon a reviewing court if the basic facts competently found by the Commissioner rightly called for a different conclusion" (R. 16). Because it thought applicable its earlier decision in a case involving a bargeman's claim for maintenance and cure under the maritime law (*Loverich* v. *Warner Co.*, 118 F. (2d) 690, certiorari denied, 313 U. S. 577), the court below reversed the judgment of the district court, and held Rusin to be a "member of a crew" and therefore excluded from the Act.

As we show in Point I, this holding is inconsistent with the decision of this Court in *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, which in similar circumstances held that the conclusion in question is one to be drawn by the Deputy Commissioner and is entitled to finality if supported by evidence and in accordance with the applicable rules of law. That the

conclusion of the Deputy Commissioner was proper by these standards we discuss in Point II (*infra* pp. 22–25) and Point III (*infra* pp. 26–35). We also show in Point III that if the court below intended to rule that the conclusion of the Deputy Commissioner is one of law which may be reversed if the Court disagrees with it, it erred because such conclusion was correct even on this theory.

I

THE FINDING OF THE DEPUTY COMMISSIONER THAT RUSIN WAS NOT A MASTER OR MEMBER OF A CREW, IF SUPPORTED BY AND REASONABLY INFERABLE FROM UNDISPUTED BASIC FACTS, IS CONCLUSIVE

Section 19 of the Act, providing for the filing of a "claim for compensation," specifies that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim." Section 21 (b) provides that a compensation order may be suspended or set aside through injunction proceedings instituted in the federal district courts "if not in accordance with law." By these sections, judicial review of a Deputy Commissioner's findings and order is limited to questions of law, leaving all factual questions to the Deputy Commissioner.[3]

[3] The legislative history indicates that Congress intended by these sections so to limit judicial review of the Deputy Commissioner's findings. See opinion of Mr. Justice Brandeis, dissenting in *Crowell* v. *Benson*, 285 U. S. 22, at 72–73.

Cf. *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162, 166, 169; *Del Vecchio* v. *Bowers*, 296 U. S. 280, 287. But the Deputy Commissioner may do more than find the basic facts; he may draw a conclusion or inference therefrom. And if the facts permit "an inference either way * * *, the Deputy Commissioner * * * alone, is empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the court" (*Del Vecchio* v. *Bowers*, 296 U. S. 280, 287).[1] The same principle is applicable to inferences and conclusions relating to questions of "coverage" under Section 3 of the Act (*South Chicago Coal and Dock Co.* v. *Bassett*, 309 U. S. 251; *Davis* v. *Department of Labor*, 317 U. S. 249, 256; cf. *Parker* v. *Motor Boat Sales*,

[1] In *Crowell* v. *Benson*, 285 U. S. 22, this Court, in order to avoid constitutional doubts, construed the Act to permit an independent judicial determination of so-called constitutional "jurisdictional" facts which bore upon the power of Congress to enact the statute. In the instant case, however, it is not disputed that Rusin was injured upon the navigable waters of the United States and was in the employ of respondent at the time of the injury—the questions which were considered in *Crowell* v. *Benson* to be determinative of the constitutional power of Congress. Since it is clear that Congress may constitutionally enact legislation affecting both longshoremen and members of a crew, *Crowell* v. *Benson* is not opposed to our contention here. On the contrary, that case affords affirmative support for our contention since the opinion of the Court states that on all other questions of facts, the findings of the Deputy Commissioner are final (285 U. S. at 46–47).

Inc., 314 U. S. 244). The only issue of law, in such a situation, is whether the Commissioner's conclusion is reasonably inferable from the basic facts. Cf. *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162, 166, 169; *Del Vecchio* v. *Bowers*, 296 U. S. 280, 287.

The *South Chicago* case is closely apposite here. The basic facts were undisputed; the Deputy Commissioner had found that the employee was not "a member of a crew" and had awarded compensation; the employer contended that this was a question of law for the courts and hence to be guided by decisions (not arising under the Act) which had defined the term in a manner thought to prevent its application to the employee concerned (309 U. S., at 253). This Court expressly rejected petitioner's contention that the question of whether the employee was "a member of a crew" was one of law, holding that "the word 'crew' does not have an absolutely unvarying legal significance" (p. 258) and that its meaning should be "define[d] * * * for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained" (p. 259). The Court concluded that "even if it could be said that the evidence permitted conflicting inferences, we

think that there was enough to sustain the deputy commissioner's ruling" (309 U. S., at 260–261).

Similarly in *Parker v. Motor Boat Sales, Inc.*, 314 U. S. 244, involving *inter alia* the question whether the employee was acting in the course of his employment—again a question requiring an inference or conclusion from undisputed facts—this Court held that "granting more than one possible conclusion could have been reached

[1] In *Cantey v. McLain Line, Inc.*, 312 U. S. 667, the Second Circuit Court of Appeals had denied recovery to a bargeman for maintenance and cure under the maritime law, holding that he was not a "member of a crew" and hence entitled to the exclusive remedy under the Longshoremen's Act. Both lower courts (32 F. Supp. 1023 (S. D. N. Y.), 114 F. (2d) 1017 (C. C. A. 2)) deemed controlling the prior decision of the Second Circuit in *Diomede v. Lowe*, 87 F. (2d) 296, certiorari denied, 301 U. S. 682, allowing recovery under the Longshoremen's Act to a bargeman in similar circumstances. This Court granted certiorari and in a memorandum *per curiam* opinion, reversed and remanded without argument (312 U. S. 667), citing *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, 258–259. We interpret that reference as again rejecting the proposition that the question whether an employee is a member of a crew is one of law, and reaffirming this Court's earlier holding that since "the word 'crew' does not have an absolutely unvarying legal significance," the question whether a given employee "was or was not a member of a crew" turns on questions of fact" (p. 257), the determination of which under the Longshoremen's Act is for the Deputy Commissioner. This was the interpretation recently given to the *Cantey* case by the second circuit itself. (*See Boyce v. Shamrock Towing Co.*, C. C. A. 2, No. 131, October Term, 1943 (decided December 29, 1943).)

upon the evidence, we think it was sufficiently clear to support the Deputy Commissioner's finding that [the employee] was acting in the course of his employment. The Circuit Court of Appeals should therefore have accepted it as final" (314 U. S., at 246). (See also *Marshall* v. *Pletz*, 317 U. S. 383, 388; *Davis* v. *Department of Labor*, 317 U. S. 249, 256, 257.)

The lower federal courts have on numerous occasions held, upon the authority of the *South Chicago* case, that conclusions of a Deputy Commissioner as to questions of coverage under Section 3 (a) (1) of the Act, are determinations of fact and as such are binding upon the courts if sustained by evidence. See *e. g.*, *Puget Sound Freight Lines* v. *Marshall*, 125 F. (2d) 876 (C. C. A. 9); *Henderson* v. *Jones*, 110 F. (2d) 952 (C. C. A. 5); *Gulf Oil Corp.* v. *McManigal*, 49 F. Supp. 75 (N. D. W. Va.); *Blaske* v. *Bassett*, 35 F. Supp. 315 (E. D. Mo.); cf. *Bowen* v. *Shamrock Towing Co.*, C. C. A. 2, No. 131, October Term, 1943 (decided December 29, 1943).

The principle of the *South Chicago* case is of course not peculiar to the Longshoremen's Act. Administrative determinations under other laws have been held conclusive when supported by substantial evidence, notwithstanding that they involved a conclusion as to the coverage or application of the statute involved. This is true of such questions as whether a carrier is an "interurban

electric railway" excluded from the coverage of the Railway Labor Act (*Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 186); whether a consumer is a "consumer-producer" exempted from the Bituminous Coal Act of 1937 (*Gray* v. *Powell*, 314 U. S. 402); whether coal is "bituminous coal" (*Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 390, 400) and whether one carrier is directly or indirectly controlled by another so as to be excepted from the Communications Act of 1934. (*Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 145–146). In each of these cases the determination as to status under the statute was dependent upon the application of an administrative judgment to substantially undisputed facts; and in each, this Court ruled that such determination, although involving the application of a statute to particular circumstances, was to be dealt with as a question of fact which the applicable statute had submitted to the judgment of the agency charged with its administration (305 U. S. at 181; 314 U. S. at 412; 310 U. S. at 400; 307 U. S. at 145). (See also *Dobson* v. *Commissioner of Internal Revenue*, Nos. 44–47, October Term, 1943 (decided December 20, 1943); *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320.) As a finding of fact such a determination by the administrative agency must of course have "warrant in the record" and a reasonable basis in law, but "the judicial function is exhausted when there is found

to be a rational basis for the conclusions approved by the administrative body" (*Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286, 287; *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 146; *Dobson* v. *Commissioner of Internal Revenue*, Nos. 44–47, October Term, 1943 (decided December 20, 1943)).

To deny to the conclusions of a Deputy Commissioner under the Longshoremen's Act the same finality under judicial review as this Court has accorded to like conclusions of other agencies under similar statutory patterns, would defeat the purpose of Congress in enacting the Longshoremen's Act already recognized by this Court (*Crowell* v. *Benson*, 285 U. S. at 46–47) to provide a "prompt" and "inexpensive" method for the disposal of claims.[6] For the courts to make

[6] This objective is clear from the face of the Act: compensation becomes due fourteen days after the employer has knowledge of the injury (Sec. 14 (b)). Where the right to compensation is controverted and an award is made by a Deputy Commissioner, a penalty of twenty percent is assessed for failure to pay compensation within ten days after payment is due (Sec. 14 (f)). *Candado Stevedoring Corp.* v. *Lowe*, 85 F. (2d) 119 (C. C. A. 2); *Arrow Stevedore Co.* v. *Pillsbury*, 88 F. (2d) 446 (C. C. A. 9). If the employer fails to make payment within thirty days after compensation is due, the Deputy Commissioner may enter a supplementary order directing payment, on which judgment and execution may be had in the appropriate federal district court (Sec. 18). In order that the burdens, delays, and hazards of litigation may not be used to induce employees to make disadvantageous agreements, any waiver of the right to compensation is forbidden by Congress (Sec. 15 (b)); agreements for

a new and independent judgment in each case as to the application of the general standards of the Act to the endless variety of circumstances which may arise in its administration, is to invite and to create litigation, with its inevitable delay between application for judicial review under Section 21 (b) and final disposition in the courts.[7] Certainly, in respect of the instant issue, the lower federal courts have not succeeded in evolving a rule of law sufficiently definite and certain to insure "prompt" and "inexpensive" judicial disposition, for the cases "attempt no definition of the crew of a vessel" (*Maryland Casualty Co.* v. *Lawson*, 94 F. (2d) 190, 192 (C. C. A. 5); *Diomede* v. *Lowe*, 87 F. (2d) 296, 298 (C. C. A. 2)). Nor could an absolute definition be formulated since each case involves "the complexity inherent in the multiple small facts which go to make up the ordinary situation of daily life" (Dickinson, *Administrative Justice and the Supremacy of the Law*, p. 251). In many cases in the "twilight

compensation without the approval of the Commission are prohibited (Sec. 16); and the United States attorney is directed to appear on behalf of the Deputy Commissioner and defend compensation orders (45 Stat. 490). To minimize the law's delays, the Act prescribes certain limitations on the granting of interlocutory injunctions staying the payment of compensation (Sec. 21 (b)).

[7] In the past as much as four years has elapsed during judicial review. See typical cases taken from files of United States Employees' Compensation Commission; cited in Brief for the Respondent, p. 31, in *South Chicago Coal & Dock Co.* v. *Bassett*, No. 262, October Term, 1939.

zone" there is no close precedent available to determine "upon which side of the median line the particular instance falls"; the making of such a determination therefore requires a difficult appraisal of the particular facts, and "calls for the expert, experienced judgment of those familiar" with the milieu, *Gray* v. *Powell*, 314 U. S., at 413. There can be little doubt that the questions presented to the Deputy Commissioner in cases of this kind fit within the "class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task" (*Crowell* v. *Benson*, 285 U. S. 22, 46–47). "The fact that many instances may occur where * * * application" of the statutory lines of demarcation "may be difficult is merely to emphasize the nature of the administrative problem and the reason for the grant of latitude" to the Deputy Commissioner by Congress. (Cf. *Sunshine Coal Co.* v. *Adkins*, 310 U. S., at 399.)

The court below apparently felt that these settled principles were here inapplicable because on closely similar facts it had held that a bargeman was a member of a crew and therefore entitled to maintain a libel in admiralty for maintenance and cure (*Loverich* v. *Warner Co.*, 118 F. (2d) 690). But that earlier decision did not bar a contrary view by an authorized administrative agency, where that view is sustained by evidence

and is reasonable in law. The function of a circuit court of appeals in reviewing the decision of an administrative agency is more limited than in a proceeding in which the courts are permitted to determine the question *de novo*. This is vividly illustrated by proceedings involving the status of the Chicago North Shore and Milwaukee Railroad Company. In *United States* v. *Chicago North Shore & M. R. Co.*, 288 U. S. 1, a proceeding in which the courts were not reviewing an administrative decision, this Court held the railroad to be interurban and thereby exempt from Section 20a of the Interstate Commerce Act. Subsequently, in a proceeding under the exempting proviso of the Railway Labor Act, the Interstate Commerce Commission held the same railway not to be an interurban. In reviewing this decision, the court was bound to accept the findings of the Commission if supported by substantial evidence and not contrary to law (*Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177). Accordingly the District Court and the Circuit Court of Appeals for the Seventh Circuit sustained the Commission's decision, and this Court denied certiorari, even though the result was contrary to that previously reached by this Court (*Sprague* v. *Woll*, 122 F. (2d) 128 (C. C. A. 7), certiorari denied, 314 U. S. 669).

It is no argument against the finality for which we contend, that inconsistency might thereby re-

sult between the Commissioner's findings under the Longshoremen's Act and those of a court on similar facts in cases arising under the general admiralty law (such as libels in admiralty by a seaman for maintenance and cure) or under the Jones Act, c. 250, 41 Stat. 988, 1007 (46 U. S. C., sec. 688) (making the Federal Employees' Liability Act applicable to seamen). Cf. *Davis* v. *Department of Labor,* 317 U. S. 249, 256. However, such inconsistency, in addition to being the accepted result of according finality to the findings of a trier of fact in matters which can come before the court *dehors* the statute, could certainly be no greater than that now displayed among the courts themselves. (Compare *Pere Marquette Railway Co.* v. *Bassett,* 42 F. Supp. 781 (W. D. Mich.), with *Braner* v. *Brooklyn Eastern District Terminal,* 46 F. Supp. 302 (E. D. N. Y.); see Brief for Respondent pp. 15–21 in *South Chicago Coal & Dock Co.* v. *Bassett,* No. 262, October Term, 1939; cf. *Davis* v. *Department of Labor,* 317 U. S. 249, 253, 254.) Indeed, in view of the Commissioners' expertise, "while [their] decisions may not be binding precedents for courts dealing with similar problems, uniform administration would be promoted by conforming to them where possible." Cf. *Dobson* v. *Commissioner of Internal Revenue,* Nos. 44–47, October Term, 1943 (decided December 20, 1943).

But even if the result of the principle of finality is an increased likelihood of inconsistent re-

sults on similar facts, the administrative benefits from the rule would far outweigh any such objection. Since cases are constantly arising in which a Deputy Commissioner is called upon to determine whether a claimant is a member of a crew, the decision below, if allowed to stand, will unduly burden and interfere with the orderly administration of the Act. This Court recently evaluated an expeditious remedy to employees for industrial injury against the likelihood of inconsistent results, and clearly indicated preference for the former consideration. In *Davis* v. *Department of Labor*, 317 U. S. 249, 254, involving a similar "twilight zone" between state and federal jurisdiction to award compensation to workmen employed on or near navigable waters, this Court recognized possible serious financial loss as well as loss of claim through operation of the statute of limitations while an injured employee was erroneously pursuing a remedy in the wrong tribunal, and the Court refused to require employees to "determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership." The decision in the *Davis* case seems *a fortiori* applicable where, as in the case at bar, the conflict is not between state and federal jurisdiction, but rather between two remedial rights granted by Federal law pursuant to the same constitutional power. In view

of the liberal construction to be accorded both the Longshoremen's Act and the Jones Act (*Warner* v. *Goltra*, 293 U. S. 155, 156, 157; *Davis* v. *Department of Labor*, 317 U. S. 249, 254), it would indeed be incongruous to require an employee in the "twilight zone" between these statutes to subject his claim under either statute to risk of loss merely because he happens to institute proceedings under the statute which a court subsequently declares inapplicable. The setting aside of the Deputy Commissioner's award herein on the theory that the Longshoremen's Act and the maritime law cannot overlap and are mutually exclusive, is squarely contrary to the principle of the *Davis* case.

II

THE DEPUTY COMMISSIONER'S CONCLUSION IS REASONABLY INFERABLE FROM THE BASIC UNDISPUTED FACTS

There is no dispute in the testimony concerning Rusin's duties, and respondent has indicated his agreement with our statement of the facts. (Respondent's Answer to Pet., p. 1.) These basic facts, found by the Deputy Commissioner and accepted as final by the court below, clearly support the conclusion drawn therefrom by the Deputy Commissioner, that Rusin was a harbor worker and not a member of the crew. His duties indeed partook of the characteristics of both, but a substantial if not the major part of his functions

were those more commonly performed by a harbor worker. Thus, Rusin's duties as a bargeman for respondent consisted of the general care of the barge to which he was assigned, including such tasks as pumping out water, repairing leaks, and adjusting lines while tied up at dock. These duties, while they pertain to the care and welfare of the vessel, are those of a caretaker or watchman—classes of maritime workers included under the Longshoreman's Act (*Union Oil Co.* v. *Pillsbury*, 63 F. (2d) 925, 926 (C. C. A. 9); *Seneca Washed Gravel Corp.* v. *McManigal*, 65 F. (2d) 779, 780 (C. C. A. 2); *Diomede* v. *Lowe*, 87 F. (2d) 296, 298 (C. C. A. 2); *South Chicago Coal & Dock Co.* v. *Bassett*, 104 F. (2d) 522, 528 (C. C. A. 7); cf. *Harper* v. *Parker*, 9 F. Supp. 744, 745 (D. Md.)). Moreover, he bought his own meals and was paid by the month, pursuant to a union contract between respondent and the Harbor Boatmen's Union; Rusin was unarticled and had no experience as a seaman other than that obtained as a bargeman. He was the only person employed upon the barge at the time of his injury.

Some of Rusin's duties might be deemed navigational, such as the putting out of navigational lights and signals while in tow, the taking of lines from tugboats, and of orders from the tugboat captain. However, these duties were performed only while in tow, which was but a small fraction of the total time; and as a bargeman, Rusin was

usually subject to orders of respondent's marine superintendent, who was stationed on shore. Except for making lines fast and unfast at the docks and tightening or slackening them as necessary, he had no other duty in connection with the operation of the barge. The barge never went to sea; its operation was confined to the several rivers and tributaries within a thirty-mile radius of Philadelphia, its trips were not more than sixty miles in length; it sometimes took fifteen days between loading and discharging, but the barge was under way only a small fraction of that time (R. 8). These are significant factors. (Cf. *Schantz* v. *American Dredging Co.*, C. C. A. 3, No. 8332, October Term, 1943 (decided October 22, 1943).)* Since it is undisputed that Rusin's principal duties related to the care and welfare of the barge, the finding of the Deputy Commissioner that Rusin's navigational duties were only incidental appear justified. (Cf. *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 255, 260.) Moreover, while it is true that Rusin lived, ate and slept aboard the barge—facts which indicate a "permanent" attachment to the boat, and bear on Rusin's being a "member of a crew" (*Maryland Casualty Co.* v. *Lawson*, 94 F. (2d) 190, 192

* We cite this and the other cases in this point to show that similar facts were given weight to support the conclusion that the employee there involved was or was not a longshoreman, and not to suggest that the presence of such facts precluded an opposite conclusion in other cases.

(C. C. A. 5)), such facts are not conclusive of themselves. (Cf. *Schantz* v. *American Dredging Co.*, C. C. A. 3d, No. 8332, October Term, 1943 (decided October 22, 1943); *Diomede* v. *Lowe*, 87 F. (2d) 296, 298 (C. C. A. 2); *Puget Sound Freight Lines* v. *Marshall*, 125 F. (2d) 876 (C. C. A. 9).) They are effectively counteracted in the instant case by the facts that Rusin was hired by a land foreman (*Schantz* v. *American Dredging Co., supra*) and most of the time was under the latter's command (*Lawson* v. *Maryland Casualty Co.*, 94 F. (2d) 193, 194 (C. C. A. 5); cf. *Moore Dry Dock Co.* v. *Pillsbury*, 100 F. (2d) 245, 247 (C. C. A. 9)); that Rusin was unarticled (cf. *Henderson* v. *Jones*, 110 F. (2d) 952, 953 (C. C. A. 5); *South Chicago Coal & Dock Co.* v. *Bassett*, 104 F. (2d) 522, 527 (C. C. A. 7)); and that he had no experience as a seaman other than he had obtained as a bargeman (cf. *Schantz* v. *American Dredging Co., supra*).

Since Rusin's duties partook of the characteristics of both a harbor worker and of a member of a crew, and since the task of the Deputy Commissioner was to determine in which class Rusin belonged by virtue of the "dominant characteristics" of his employment (cf. *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 187), there is plainly a "rational basis" in the undisputed facts for the Commissioner's conclusion. (Cf. *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 146.)

III

THE CONCLUSION OF THE DEPUTY COMMISSIONER IS NOT ONLY REASONABLE BUT ALSO CORRECT UNDER THE APPLICABLE RULES OF LAW

We believe, for reasons already stated (pp. 10–22, *supra*), that the conclusion of the Deputy Commissioner is properly to be treated as a factual question, or at least as one in which elements of fact and of expertise so preponderate as to justify the same rule of finality as is applied to findings of fact. This rule requires, of course, that the conclusion be reasonable in light of the applicable rules of law. However, if contrary to our contention, the conclusion of the Deputy Commissioner is a determination of law which the court is free to reverse unless clearly correct, we submit that the legislative history of the Act and the decisions thereunder demonstrate that the conclusion of the Deputy Commissioner not only was reasonable and has not "departed from applicable principles of law" (cf. *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 187), but was clearly correct under these authorities. In either view, therefore, the court below improperly set aside the Deputy Commissioner's conclusion. Since the same legal materials are pertinent in either view, we treat them together.

The original purpose of the bill which upon enactment became the Longshoremen's Act was to provide workmen's compensation benefits for

those maritime workers—such as longshoremen and stevedores—who, as a result of the decisions of this Court in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Washington* v. *Dawson & Co.*, 264 U. S. 219, were without protection under either local workmen's compensation laws or federal admiralty law (S. Rep. No. 973, 69th Cong., 1st Sess., p. 16). As reported to the Senate by its Judiciary Committee, the bill exempted from coverage "a master or seaman, as defined in section 4612 of the Revised Statutes, as amended" (S. Rep. No. 973, 69th Cong., 1st Sess., p. 2) and it was thus passed by the Senate (67 Cong. Rec. 10614). This would have excluded virtually all maritime workers.* However, in the hearings before the House Judiciary Committee, the shipowners sought to include all maritime workers under the coverage of the bill on the ground that uniformity of protection was desirable. Hearings, House Committee on the Judiciary, on S. 3170 (69th Cong., 1st Sess.) pp. 142–43, 147, 180, 185, 186, 199. The bill reported by that com-

* Section 4612 of Revised Statutes (46 U. S. C., sec. 713) provides that "every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river * * *."

mittee covered all maritime workers (H. Rep. No. 1767, 69th Cong., 2d Sess., pp. 2, 19), despite vigorous opposition from the International Seamen's Union of America, based on "the fundamental distinction between a seaman and a man working in a harbor or working on shore." Hearings, House Committee on the Judiciary, on H. R. 9498 (69th Cong., 1st Sess.) p. 104; Hearings, Subcommittee of Senate Committee on the Judiciary, on S. 3170 (69th Cong., 1st Sess.) p. 17. As a result of the seamen's opposition, the present language of the exception in Section 3 (a) (1) was introduced in the House and became law (68 Cong. Rec. 5402, 5403, 5908), allowing seamen to retain their rights under the maritime law and the Jones Act (46 U. S. C., §688).[19] *Noguera* v. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128, 136; *Warner* v. *Goltra*, 293 U. S. 155, 160; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 256, 257.

In the *South Chicago* case, this Court recognized that "Congress in finally adopting the phrase 'a master or member of a crew' in making its exception, intended to leave entitled to compensation all those various sorts of longshoremen and harbor workers who were performing labor on a vessel,

[19] The phrase "master and member of the crew" rather than "seamen" was used undoubtedly because this Court had defined "seamen" for the purpose of the Jones Act to include stevedores. *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50; 68 Cong. Rec. 5402–5403.

[subject to a minor exception not here relevant] and to whom state compensation statutes were inapplicable." (309 U. S., at 257.) This Court there construed the exception to cover only "employees on the vessel who are naturally and primarily on board to aid in her navigation" (p. 260), citing with approval *De Wald* v. *Baltimore & Ohio R. R. Co.*, 71 F. (2d) 810 (C. C. A. 4), certiorari denied, 293 U. S. 581; *Diomede* v. *Lowe*, 87 F. (2d) 296 (C. C. A. 2), certiorari denied, 301 U. S. 682; *Moore Dry Dock Co.* v. *Pillsbury*, 100 F. (2d) 245 (C. C. A. 9).[11] This Court's formulation of the scope of the exception, in the light of its approval of these three cases, appears to adopt the suggestion there made that Congress intended to exclude

[11] In both the *Diomede* and *De Wald* cases, the courts' refusal to hold a bargeman within the statutory exception was based upon the further ground that a single employee in charge of a boat without means of self-propulsion and unmanned except for its "Captain" could not be either a master or member of a crew. "A 'master' without men to command, without a ship to navigate, and subject to the orders of the tug captain when the scow is in tow, is a notion difficult to accept" whereas "the word 'crew' is used in the statute to connote a *company* of seamen belonging to the vessel * * *. It is the 'ship's company'" [italics added] (87 F. (2d) 296, 298). See also *Seneca Washed Gravel Corp.* v. *McManigal*, 65 F. (2d) 779 (C. C. A. 2); *Taylor* v. *McManigal*, 89 F. (2d) 583, 585 (C. C. A. 6); *Harper* v. *Parker*, 5 F. Supp. 744 (D. Md.), cited in *South Chicago Coal & Dock Co.* v. *Bassett*, 104 F. (2d) 522, 526, 528 (C. C. A. 7). If valid, this reasoning in those cases is further authority for the correctness of the Deputy Commissioner's conclusion in the instant case.

thereby from the coverage of the Act only "seafaring men" subjected to the "perils of the sea." (See Brief for Respondent in *South Chicago Coal & Dock Co.* v. *Bassett*, No. 262, October Term, 1939, p. 14.).

In view of the very narrow scope of the exception (cf. *Diomede* v. *Lowe, supra*) and the liberal construction accorded the statute in furtherance of its remedial purpose (*Nogueira* v. *N. Y., N. H. & H. R. R. Co.*, 281 U. S. 128, 136; *Warner* v. *Goltra*, 293 U. S. 155, 160), the Commissioner's conclusion in the instant case not only is eminently reasonable but also clearly correct, since the entire economic and social basis for the exception does not apply to bargemen as a class. A seaman of the type who opposed inclusion under the Act surrenders personal rights and liberties in binding himself to the vessel as a member of its crew. As such, he must obey commands given him regardless of the personal danger involved. In exchange for so binding himself he receives medical care and treatment aboard ships or in marine hospitals without expense to himself, is entitled to small payments for maintenance and cure during disability and hospitalization, and usually has an accumulation of wages at the end of a voyage (46 U. S. C. § 596, 597)—factors making it possible for him to undergo a period of disability without hardship while awaiting recovery under the Jones Act.

None of these circumstances attends bargemen. In contrast to seamen, bargemen as a class do not undergo the hardships and dangers of the high seas (cf. R. 8), nor are they subject to the requirement of absolute obedience. Moreover, since barges of the type involved in this case are exempt from documentation (46 U. S. S. §§ 332, 335) and the bulk of them are not documented (see 46 U. S. C. § 801), bargemen generally are not entitled to hospitalization or treatment at the marine hospitals, which admit only "merchant marine seamen" (24 U. S. C. § 26, 26a)—that is, seamen aboard documented vessels of the United States (42 C. F. R. § 2.21–2.46). Nor are bargemen afforded care aboard the vessel when injured, for there are neither facilities nor personnel on board to care for him, and the owner is not required to maintain a chest of medicines (cf. 46 U. S. C. § 666). Bargemen frequently live ashore and customarily go home at night, leaving their vessels unattended.[12] They are paid periodically, do not receive accumulated wages at the end of a voyage, and must meet the daily expenses of themselves and their families (cf. R. 8).

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[12] This custom has been recognized in this Court and elsewhere, and the practice has been held not to give rise to fault. *The Granite State*, 3 Wall. 310; *The Bridgeport*, 14 Wall. 116; *The Kathryn B. Guinan*, 176 Fed. 301 (C. C. A. 2); *The No. C–4*, 300 Fed. 757 (S. D. N. Y.), affirmed, 300 Fed. 761 (C. C. A. 2); *Goodwin-Gallagher Sand & Gravel Corp.* v. *Washington-Bulkley, Inc.*, 31 F. (2d) 112, 114 (E. D. N. Y.), affirmed, 31 F. (2d) 115 (C. C. A. 2).

Acceptance by Congress in the Act of the "fundamental distinction between seamen and a man working in a harbor or working on shore," implicitly recognizes that such workers, unlike seamen, require the prompt and sure relief afforded by the Act; and that they should not be required to forego the more certain if more modest benefits of that Act for a possibly greater recovery under the Jones Act (46 U. S. C. sec. 688) after the law's delays. This consideration makes the conclusion of the Deputy Commissioner in the case at bar both eminently reasonable and clearly correct.

The lower court's conclusion to the contrary is apparently based upon a misreading of the statutory exemption. While admitting that "the question concerned [the employee's] actual duties," the court held that "where such duties pertain to the welfare and operation of the vessel, the employee is a seaman and, as such, is the master or member of the crew of the vessel, as the case may be" (R. 17).[13] This phrasing of the scope of the exception not only departs from

[13] The use in the instant case of this phrase, which may be traced to Article 10 of Treasury Regulations 91 (promulgated under Title VIII of the Social Security Act), was undoubtedly the result of the fact that the court was simultaneously considering whether wages paid bargees were exempt from payment of Social Security tax under Section 811 (b) (5) of the Social Security Law (49 Stat. 639; 53 Stat. 1400, 42 U. S. C. 1011 (b) (5)), exempting wages paid for "service performed as an officer or member of the crew of a vessel documented under the law of the United States".

the criterion established in the *South Chicago* case, but by encompassing within the exception maritime workers other than "seafaring men," it conflicts with the broad remedial purposes of the Act to legislate comprehensively for all maritime workers, subject to the narrow exceptions provided therein.

Moreover, the lower court in reversing the conclusion of the Deputy Commissioner relied very heavily on its earlier decision in *Lovcrich* v. *Warner Co.*, 118 F. (2d) 690, certiorari denied, 313 U. S. 577, involving the respondent in the

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Berwind-White Coal Mining Co. v. *Rothensies*, 137 F. (2d) 60 (C. C. A. 3). Article 10 of Treasury Regulations 91 deals with this exemption, and provides that the exemption applies to "every individual * * * serving on board the vessel and contributing in any way to the operation and welfare of the vessel." Congress' intention in inserting this exemption was apparently to exempt migratory workers because of the difficulty of administration and identification. Since the reasons behind the exceptions are totally different, the court below improperly utilized precedents under the Social Security Act to support its conclusion under the Longshoremen's Act. *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. at 259. Moreover, it is clear from these regulations that the phrase was intended to include only those members of the ship's company, such as cooks, clerks, stewards, and mess attendants, whose duties while not directly related to navigation of the vessel are rather in the service of those who participate in navigation. The exemption under the Longshoremen's Act has already been so construed. *A. L. Mechling Barge Line* v. *Bassett*, 119 F. (2d) 995 (C. C. A. 7). In any case, the Bureau of Internal Revenue—the administrative agency which promulgated and interprets these regulations—had ruled that under the regulations bargemen similar to Rusin were not within the exception of "officer or member of the crew." (S. S. T. 366, 1939-1 (Part 1) Cum. Bul. 300.)

instant case. That case involved a suit brought by the injured employee in 1939 for indemnity and maintenance and cure under general admiralty law, on account of an injury occurring in 1926. Since it seems clear from the entire structure of the Longshoremen's Act (enacted in 1927) that it was not intended to supersede liability under general admiralty law accruing from past injuries, the decision of the court below that the employee was excluded from the Act because a member of a crew was wholly unnecessary to its decision there.[1] Further, the court based its ruling on the facts that the employee was "a licensed junior engineer and water tender and qualified as an able seaman and barge master, 2nd mate and 3rd mate" (118 F. (2d) at 694). These facts bear upon the employee's attainments, and not upon his actual duties—the true criterion.[2] (See *South Chicago*

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[1] The district court in the *Loverich* case had dismissed the indemnity claim on the ground of laches, but held that since defendant's failure to provide maintenance and cure was a continuing breach of his obligation, the employee's right to recover therefor for the six years prior to suit was not barred by laches. The question as to the employee's rights under the Longshoremen's Act was raised for the first time upon appeal to the circuit court, where it was claimed *inter alia* that the right to maintenance and cure arising after 1927 had been superseded by the Longshoremen's Act, which provided an exclusive remedy. The court below held that the injured employee was within the exception to the Longshoremen's Act, and therefore that his rights to maintenance and cure were unaffected by it.

[2] There is no reference to the employee's actual duties either in the opinions or in the briefs filed by defendant.

Coal & Dock Co. v. *Bassett*, 309 U. S. at 260.) Clearly, therefore, the decision in the *Loverich* case does not require reversal in the Deputy Commissioner's finding. Moreover, insofar as the Deputy Commissioner's conclusion need only be reasonable in light of applicable rules of law, the difference in the nature and theory of the suits deprives the lower court's reliance on the *Loverich* case of all validity, since the latter case involved the review by the circuit court of a decision made in the first instance by the district court—a function involving much broader powers of scrutiny than review of a conclusion of a Deputy Commissioner. See pp. 18–19, *supra*.

CONCLUSION

The judgement below is erroneous and should be reversed.

Respectfully submitted.

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JANUARY 1944.

APPENDIX

The pertinent provisions of Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424 (33 U. S. C. § 901 *et seq.*) are as follows:

DEFINITIONS

SEC. 2 [33 U. S. C. § 902]. When used in this Act—

* * *

(3) The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

COVERAGE

SEC. 3 [33 U. S. C. § 903]. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; * * *

PROCEDURE IN RESPECT OF CLAIMS

SEC. 19 [33 U. S. C. § 919]. (a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the commission at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

REVIEW OF COMPENSATION ORDERS

SEC. 21 [33 U. S. C. § 921]. * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the district court of the United States for the District of Columbia if the injury occurred in the District). * * *